



Generally Speaking

Comings and Goings

Welcome to **Kristina Murray** who started as an Administrative Clerk II in the Anchorage office.

Congratulations to **Penny Helgeson**, promoted to a new paralegal position within the Torts and Workers' Compensation Section. **Courtney Dowling** has filled Penny's LOA I position. The section is very pleased to continue to have Penny's contribution and welcome Courtney on board.

Joyce Villard accepted a paralegal position with the Commercial and Fair Business Section.

Welcome to **ADA Kelly Lawson**, in the Kenai DAO office.

Shannon Eddy has returned to the Criminal Division - OSPA as the statewide bootlegging attorney. **ADA Eddy** worked in the Anchorage DAO previously before spending a stint as a

prosecuting attorney in Bend, Oregon. She is welcomed back to the division.

Susan Mitchell, previously in private practice, has joined the Dillingham DAO as the sole ADA. She replaces **ADA Ben Hofmeister** who will be joining the Anchorage DAO in April.

CIVIL DIVISION

Child Protection

New CINA cases based upon allegations in OCS petitions:

Anchorage police responded to a call that an intoxicated mother had been vomiting on her infant daughter as well as on herself. The mother was found with the naked child outside when it was -10 degrees. The mother was out of control, incoherent, and then became unresponsive. She was taken by ambulance to the hospital. When she was released she was arrested for child neglect, and OCS social workers took the child into custody.

A child and his siblings were taken into custody by OCS after the child was physically abused by his father. The child had bruising in a 7 X 9 inch area, consistent with trauma caused by a strap or belt. The father was arrested for child abuse.

An infant was seen at a hospital with injuries that were the result of suffocation, according to a pediatrician. The child's mother said it was not the first time the child had such symptoms. The perpetrator was unknown because the child had many caretakers. OCS developed a safety plan with the mother that required the child not be left alone with anyone, but the mother failed to follow the safety plan. The mother's living situation was such that there were many individuals coming and going with excessive alcohol consumption being

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reported. OCS filed a petition for temporary custody.

OCS assumed custody of four children after investigating a report that their father had sexually abused other children in the family home. It is also alleged that the mother lured the other children into the home and participated in the sexual abuse incidents.

OCS took custody of a two-month-old child who arrived at a hospital when his mother was taken there by ambulance. She had been found vomiting blood, shaking severely, and had a BAC of .209. The mother reported she had been drinking continuously for three days. This mother had three other children removed from her care previously.

A mother gave birth to a premature child while enroute to the hospital. It appeared the mother had not received prenatal care. The child's merconium tested positive for cocaine, barbiturates, and Phenobarbital. She was medically fragile due to complications caused from a cocaine-induced brain hemorrhage and experienced seizures. The child underwent laser surgery on her eyes and is at risk of losing her eyesight as a result of the hemorrhaging. OCS took custody of the child.

OCS assumed custody of a two-year-old when his mother was intoxicated and arrested for child neglect. OCS contacted six different family members and friends in an effort to avoid foster care placement, but no one was willing to care for the child.

OCS had numerous new cases as a result of substance abuse leading to parental abuse or neglect.

CINA Issues

AAG Poke Haffner in the Fairbanks office prevailed in a case in which a great-aunt argued that she was an "aunt" for purposes of the adult family member preference. The court refused to expand the definition of "aunt" to "great-aunt".

The court also ruled that AS 47.14.100(e) regarding the priority preference for foster care placement does not apply once the department's plan becomes adoption.

Activities

Several Anchorage attorneys attended a presentation by Deputy Commissioner Tammy Sandoval on the new Safety Assessment protocol being implemented by the Office of Children's Services. Attorneys will be attending more in-depth training at two-day sessions in March.

Human Services

Litigation Update

Section Chief Stacie Kraly responded to a petition for review in the *Baker* matter. The issues raised therein related to whether the state's notices are defective. AAG Kraly did not oppose the petition for review but requested relief on alternative grounds from those argued by the plaintiffs.

AAGs Stacie Kraly and Rebecca Polizzotto continue to finish the Certificate of Need case in Fairbanks. They have been spending time on the post-hearing brief, closing argument, and motions to supplement the record.

AAG Polizzotto is starting to work on briefs in her Medicaid audit cases. There are 12 appeals in various stages.

AAGs Libby Bakalar and Stacie Kraly filed an opposition and cross motion for summary judgment in an administrative appeal, related to a certificate of need dispute over independent diagnostic testing facilities in the Mat-Su and south Anchorage.

Medicaid

Subrogation/Liens

During the month of February to date, the section has collected a total of \$40,197.57 because of 14 case resolutions. Currently, there is an inventory of 655 open matters and the inventory of open files continues to increase. When compared with calendar year 2006, the collections for January and February 2007 have significantly decreased, although the numbers of files resolved remain relatively constant. For February 2006, there were 15 resolutions resulting in a collection of \$318,335.97. It remains to be seen whether the decrease in collection totals are simply the result of variability in case value and distribution or whether reduced collections are a result of the impact of the U.S. Supreme Court's *Ahlborn* decision, limiting the scope of states' Medicaid lien enforcement.

During the next 30–60 days, the state will receive payment for its Medicaid expenditures related to the *Zyprexa* mass tort litigation. The section believes the *Zyprexa* matter is the first mass tort litigation where Medicaid reimbursement has been addressed in a global fashion as multiple state Medicaid agencies are involved. Alaska's reimbursement will be \$51,721.51.

Agency Matters

The section continues to work on policy and procedures related to the administration of the Personal Care Attendant program.

Licensing

There were no licensing hearings in February. There continues to be a lot of day-to-day agency advice on a variety of matters and issues related to the administration of the programs.

Labor and State Affairs

Alaska Public Offices Commission

Judge Michalski granted summary judgment to the state in *Marijuana Policy Project v. APOC*, rejecting an interest group's complaint that APOC should have investigated the campaign-related spending of the federal government's "drug czar" to defeat the 2004 marijuana initiative. The court concluded that the law regulating campaign finance did not by its terms cover the conduct of the federal government and APOC was correct not to investigate the complaint. AAG Margaret Paton-Walsh represented APOC.

Education

In *Bickford v. State* on February 9, 2007, the Alaska Supreme Court concluded that the Department of Education and Early Development did not violate the Individuals with Disabilities Education Act (IDEA) by requiring a parent seeking redress to clarify the type of complaint being filed. IDEA (and other federal and state laws and regulations) provides more than one method of redress and the parent's letter of complaint was unclear. Ms. Bickford's claim could have been understood to be a notice of litigation, a request for a due process hearing (which would be against the school district her child attended, instead of the department), or a complaint requiring the department to investigate. AAG Neil Slotnick represented the department.

Elections

The Alaska Supreme Court issued its written decision on February 16, 2007 in *Edgmon v. Lieutenant Governor*, a case handled by AAG Sarah Felix. The Court earlier had ordered the state to count five additional ballots cast in the primary election contest between incumbent Carl Moses and Bryce Edgmon. This decision provided the Court's reasons for rejecting the Division of Elections' decisions not to count the five ballots. It ordered three ballots to be

counted that were disqualified for “over voting” after finding that the intent of the voter was clear. The Court also required two “special needs voter” ballots be counted even though the voter did not provide both a residence and mailing address on the form, as required. The Court reasoned that, if the two addresses were the same, a single address should be sufficient.

On February 20, 2007 Judge Burgess of the federal district court granted the state’s motion to dismiss in *Alaska Independence Party and Alaskan Libertarian Party v. Division of Elections*. In that case two political parties objected to the primary system required by statute and claimed a constitutional right to specify their own procedures (a convention) for nominating candidates. The court concluded that Alaska’s primary system is constitutional under the U.S. and Alaska Constitutions. A significant aspect of the decision was the court’s use of the lower tier of scrutiny in examining the severity of the statutory burden on the associational rights of the two political parties. AAG Mike Barnhill represented the division.

On February 23, 2007 the Alaska Supreme Court ruled in favor of the state in *Alaskans for Efficient Government v. State*, concluding the lieutenant governor had properly declined to certify a proposed initiative. The initiative included a section requiring a super majority vote for the legislature to pass tax-related bills. The lieutenant governor declined to certify the petition on the basis that the initiative’s super majority requirement would effectively amend the constitution, which cannot be done through the initiative process. The Court held the initiative was properly rejected for violating constitutional restrictions on the initiative process. AAG Brenda Page represented the state.

Employment

On February 5, 2007 the state obtained a summary judgment dismissing all claims made in *Kross v. State*, concerning a claim of sexual harassment by a Department of Corrections

employee. AAG Richard Postma had argued that judgment for the state was justified because the plaintiff failed to exhaust administrative remedies, and because an independent action for a public policy tort was unjustified where the employee had adequate legal alternatives.

On February 6, 2007 AAG Bill Milks argued cross motions for summary judgment in *ASEA v. State*, an action against the state to enforce an arbitration award. The dispute was over the sufficiency of the arbitrator’s award reinstating an employee with the Department of Corrections. Judge Stowers issued his decision on the record, determining that the award against the state should be enforced.

Medicaid Rate Review

On February 21, 2007 Judge Sedwick granted the state’s motion to intervene in *City and Borough of Juneau, Alaska v. Centers for Medicare and Medicaid Services, Region 10*, for purposes of filing an appeal of the judge’s decision in this federal district court case to the Ninth Circuit Court of Appeals. Bartlett Hospital and a federal regulatory agency were the parties to the action, but the court’s decision affects the validity of the state’s federally approved plan for payment of Medicaid to health care providers in the state. Intervention, following the court’s summary judgment ruling, will permit the state to prosecute an appeal of the judgment. AAG Susan Daniels is representing the state.

Motor Vehicles

On January 26, 2007 the Alaska Supreme Court issued its decision in *Harman v. State* reversing the Division of Motor Vehicles decision to revoke a driver’s license for three months because the hearing officer failed to tell the pro se litigant on how to obtain a critical piece of evidence. The arresting officer testified at the hearing that he listened to an audiotape to refresh his recollection about the traffic stop. The driver did not cross examine the officer or ask to have the tape entered into evidence. Nevertheless, the Court

ruled that in the case of a pro se litigant, the hearing officer had an obligation *sua sponte* to "inform a pro se litigant of the proper procedure for the action he or she is obviously attempting to accomplish," which in this case meant the hearing officer should have taken the audiotape into evidence without a specific request from the driver. The Court remanded the case for further proceedings. AAG Richard Postma handled this appeal.

On February 15, 2007 AAG Margaret Paton-Walsh argued her first case before the Alaska Supreme Court in ***Morris v. State***, a driver's license revocation appeal. The appeal involves an alleged conflict between the state's breath test and a later blood test that the driver tried to use to discredit the breath test.

Retirement and Benefits

On January 25, 2007 the Office of Administrative Hearings (OAH) proposed a decision favorable to the Division of Retirement and Benefits. The ALJ rejected an employee's claim of "extraordinary circumstances" to waive the 90-day requirement to provide notice of a claim for occupational disability benefits. AAG Toby Steinberger represented the division at the hearing on January 4, 2007.

The division received a favorable decision on February 1, 2007 in a disability matter involving claims for on-going physical therapy. Not only was the decision favorable, but the hearing officer had some very nice comments in the opinion about how AAG Joan Wilkerson handled the case.

On February 20, 2007 the OAH proposed denying summary judgment to a retiree who tried to increase his retirement benefit by cashing in leave immediately before retiring. The retiree's claim will go to a hearing in which AAG Toby Steinberger will represent the division.

Special thanks to AAGs Neil Slotnick and Rachel Witty for their offers to assist with the heavy retirement and benefits caseload.

Legislation Regulations

During February 2007, the Legislation and Regulations Section spent an active month reviewing legislation for the 2007 regular session of the Alaska State Legislature. The section finalized two bill reviews for consideration by the governor.

Regulations projects reviewed in the section included:

- (1) Department of Labor and Workforce Development (unemployment insurance);
- (2) State Board of Education and Early Development (teacher certification and special education alternative program certificates; foreign language examination scores for highly qualified teachers; pupil transportation and school bus standards; professional performance standards for teachers with respect to facilitating, monitoring, and assessing student learning);
- (3) Real Estate Commission (real estate course certification); and
- (4) Department of Health and Social Services (Medicaid adult dental services).

Natural Resources

Surface Coal Mining Regulations

Senior AAG Mary Lundquist is assisting DNR in drafting the public notices and preparing the surface coal mining regulations for public comment. The coal regulations revisions have been blessed, at least conceptually, by the federal government. The regulations will now have to be run through the state regulations review procedures before they can be finalized.

Defenders of Wildlife, et al. v. State

On January 31, 2007, Judge Morse denied a preliminary injunction requested by the Defenders of Wildlife, Alaska Wildlife Alliance and Sierra Club that would have halted all five of Alaska's

currently-active predator control programs. February and March are the most critical months for these programs, so this year's goals could not have been met had the injunction been granted. The judge found that the plaintiffs were not likely to prevail on the merits of their legal challenges and that the state stood to suffer significant losses as compared to the plaintiffs allegations of harm. Subsequently, the judge also granted the state's motion to consolidate the Defenders of Wildlife case with another new challenge to the programs brought by the Friends of Animals. In an earlier challenge, also brought by the Friends of Animals, Judge Gleason recently held that the plaintiffs were prevailing parties because they had briefly, for two days, succeeded in having the programs invalidated on procedural grounds, and awarded them roughly \$96,000 in public interest litigant attorney fees. The state has now appealed that award. Senior AAG Kevin Saxby represents the Board of Game and Department of Fish and Game in these cases.

Board of Agriculture and Conservation Meeting

AAG Tina Otto attended the Board of Agriculture and Conservation meeting on February 5, 2007.

Board of Fisheries Meetings

Senior AAG Lance Nelson attended two Board of Fisheries meetings in Anchorage during February. The first meeting dealt with Arctic-Yukon-Kuskokwim fishery regulatory proposals, and the second with Alaska Peninsula and Aleutian Islands fisheries. A particular item of interest was a proposal to authorize customary trade of salmon by subsistence users for limited amounts of cash. That proposal was rescheduled for action during the Board's March 9-13, 2007 meeting because the Board wanted to further study the implications of customary trade.

Federal Subsistence Issues Brewing

AAGs Mike Sewright and Steven Daugherty continue to provide extensive advice to the Alaska Department of Fish and Game regarding federal

subsistence matters. Recent assistance included review of comments on federal wildlife proposals for 2007-2008. Assistance also included review of comments on two groups of controversial federal harvest proposals. One group of proposals involved proposed federal subsistence fisheries for trout and salmon, limited to residents of Ninilchik, Happy Valley, Hope, and Cooper Landing, in Kenai River drainages. Another group of proposals involved proposed federal subsistence fisheries for trout and salmon, limited to residents of Ninilchik and Happy Valley, in the Kasilof drainage.

Opinions, Appeals and Ethics

Ethics

The section devoted a great deal of time in February to ethics legislation. AAG Dave Jones appeared before legislative committees to discuss the governor's ethics bill, proposed amendments to the bill, and other ethics bills. He also met with legislators and their aides to discuss the bills, and assisted with drafting revisions.

The section provided ethics training for the Lieutenant Governor's staff at the end of January 2007. AAG Judy Bockmon gave an ethics presentation to the Regulatory Commission of Alaska on February 26, 2007. Several additional requests for training were received.

Three requests for conflict waivers were considered and granted.

Appeals/Litigation

Sheldon v. City of Ambler. The state's brief of amicus curiae has been accepted in the Alaska Supreme Court. The state is arguing that the Court should revisit the issue of the appropriate standard for qualified immunity in excessive force cases. That is, that the Court should overrule *Samaniego v. City of Kodiak*, 2 P.3d 78 (Alaska 2000), and bring the test for qualified immunity in the excessive force context in line with federal case law. *Samaniego* relied on then-current Ninth Circuit analysis in *Katz v. United States*, a

case that was reversed by the United States Supreme Court the year after *Samaniego* was decided by our court.

DeNardo v. Judge Joannides. AAG Mary Lundquist has moved for relief from discovery. Mr. DeNardo issued requests for admissions (and has promised ensuing Interrogatories and other discovery) regarding the content of documents that have been submitted to the court and that the state finds relevant to the issue of whether an order should be issued that would require pre-filing screening of certain DeNardo cases. The motion for a pre-filing order would require court review and leave of the court before Mr. DeNardo is allowed to file any action against the judiciary. The state is arguing that the requests for admissions were issued in violation of the court's order regarding the exchange of documents relevant to whether a pre-filing order should be issued. Mr. DeNardo joined Judge Joannides in ongoing litigation as a defendant after she refused to recuse herself and Mr. DeNardo's peremptory challenge was denied as untimely.

Alaska Dental Society and American Dental Association v. Alaska Native Tribal Health Consortium. All parties filed oppositions to motions for summary judgment in the dental health aide technician lawsuit. The American Dental Association and the Alaska Dental Society, along with several individual dentists, sued the state and the Alaska Native Tribal Health Consortium to enjoin federally-certified dental health aide technicians who are providing dental care to Alaska Natives in rural villages from providing that care. The dentists also sued to compel the state to enforce the state dental practices licensing act against the technicians on the theory that they are practicing dentistry without licenses. The state refuses to take such enforcement action in light of an attorney general opinion concluding that the state licensing law conflicts with congressional intent and is thus unenforceable against federally-certified dental health aide technicians. Replies to the summary judgment oppositions are due in March 2007; the trial is scheduled for October 2007. AAGs Paul

Lyle and Mike Hotchkin are handling the case for the state.

B.P. v. SOA, OCS. AAG Mike Hotchkin delivered the state's oral argument to the Alaska Supreme Court in this termination of parental rights case from Kodiak. The issue is whether the state Office of Children's Services (OCS) made reasonable efforts to reunify the family, particularly in regard to the father, who argued that OCS never made clear to him what he needed to do and offered him nothing in the way of reunification services. OCS's position, that over the history of the case the father demonstrated an unwillingness to comply with OCS, is supported by the testimony of the only expert to testify; she concluded the father was not amenable to services and was more likely to undermine services than benefit from them. At argument, the justices asked many questions of OCS, but few of the father. By statute, the Court should issue its decision by May 16, 2007.

Regulatory Affairs & Public Advocacy (RAPA)

Stipulated Settlement Approved

U-06-46(5), Enstar Service Line Extension.

The RCA accepted a stipulation filed by Enstar Natural Gas Co. and the AG/RAPA which resolved contested implementation issues arising from the RCA's prior approval of an Enstar increase in line extension fees and related rules (TA140-4). RAPA filed testimony in preparation for hearing that specified a particular cut-off date for application of the *old* tariff fee for utility installation of a meter and/or service line. The approved stipulation provides for certain customers to receive service connections at the old rates, and provides for the issuance of refunds to certain customers.

Pre-filed Testimony

U-06-76/77, GHU/CUC water and wastewater.

Golden Heart Utilities (GHU) and College Utilities Corp. (CUC) are investor-owned utilities, each

of which provides water and wastewater services in the Fairbanks service area. In these rate cases, the water utilities are seeking a 9% rate increase and the wastewater utilities are seeking a 13% increase. On February 23, 2007, RAPA filed the direct testimony of its staff witness, Janet Fairchild, and its contract witnesses, Ralph Smith and J. Randall Woolridge. A hearing is scheduled for May 14, 2007. These cases follow similar rate cases involving the same utilities last year (U-05-43/44) in which RAPA litigated numerous aspects of the utilities' filings. Upon completion of the adjudicatory hearing, the RCA ordered the utilities to issue refunds to ratepayers.

Intervention Summary Update

As of February 22, 2007, RAPA is involved in 23 dockets before the RCA, and one appeal in the Superior Court. The RCA proceedings include 19 adjudicatory matters in which the Attorney General/public advocate is participating as a party, three rulemaking proceedings in which RAPA is participating in workshops and hearings, and one docket proposing DOL-related statutory revisions. RAPA also monitors related matters before the RCA, the Alaska Legislature, the FCC and the U.S. Congress, and provides policy analysis to the Attorney General and through the Attorney General to the Governor's Office, as requested.

Torts & Workers' Compensation

Alaska State Troopers Dismissed From Two Lawsuits

After the U.S. District Court granted the state's motion for summary judgment on the plaintiff's 1983 claims in an excessive force case brought against individually named state troopers, the plaintiffs sought reconsideration and "re-characterized" their claims. The court granted the plaintiff's motion and requested re-briefing on the issues. With briefing completed, the court again granted summary judgment to the troopers and

dismissed the troopers. This matter was handled by AAG Dave Floerchinger.

In a case filed against state troopers in Fairbanks arising out of a criminal case, Judge Olsen granted defendants' motion for summary judgment dismissing the case. The court found that there was probable cause to prosecute the plaintiff for misconduct with a controlled substance, based on the prosecutor's independent review of the charges and the Grand Jury's indictment. This case was handled by AAG Stephanie Galbraith Moore.

Corrections 3 – Pro Se 0

The torts section this month favorably resolved two cases brought against the Department of Corrections by a pro se litigant. In his first suit, the pro se alleged that DOC wrongfully denied him discretionary pre-release furlough. DOC, represented by AAG Ruth Botstein, moved for summary judgment on the grounds that the superior court lacks jurisdiction to review discretionary DOC classification decisions and that plaintiff's allegations could not state a colorable constitutional claim. Judge William Morse granted summary judgment in DOC's favor on February 5, 2007. The plaintiff now faces mounting Rule 82 fees as a result of this successful motion practice, as well as fees arising out of the adverse jury verdict against him in a prison slip-and-fall case that AAG Rebecca Cain successfully defended in November 2006. Faced with the prospect of yet another fee award, the pro se has agreed to drop his third suit against DOC, an excessive force claim that was set for trial in April 2007.

CRIMINAL DIVISION

Kenai DAO

Welcome Addition

The Kenai office is very pleased ADA Kelly Lawson recently began work. Although she had

worked at the Fairbanks office, she was not new to Kenai, as she had previously volunteered in the Kenai office when it was short-staffed a few years ago. ADA Lawson not only hit the ground running, but started a trial her in her second week.

Grand Jury

The grand jury heard some cases with a hint of humor at the start of February. In one case the defendant couple reported their truck stolen in 2002; then in 2006 they were involved in an accident and fled the scene. They were stopped by the police and had the wrong license plate on the vehicle. A VIN check revealed they were driving the same truck they had reported stolen four years before. The couple assured police someone had given the truck to them. They claimed they didn't recognize it as being the same truck they had previously owned, and had received over a \$10,000 insurance payment for.

In another case, a defendant turned his crime into a family affair. He was arrested for a DUI and officers thought it was a misdemeanor, because his priors were so recent they had not made it into APSIN yet. However, his daughter kept trying to say she was the driver, because she didn't want her father to have a felony. The officers figured this all out and arrested the father for felony DUI and the daughter for hindering. The daughter called her boyfriend from jail, and convinced him to go to police and tell them she was driving. He did, but the officer talked him out of it, assuring him the phone calls had been monitored. After the officer left, the boyfriend returned and signed a notarized statement that the daughter was the driver. The boyfriend got arrested as well.

The grand jury heard about an ex-wife who reported crimes against her ex-husband. As soon as he was arrested, she broke into his house with her new boyfriend and stole everything that wasn't nailed down. As soon as the ex-husband was released and discovered the burglary, the ex-wife was arrested when a search

warrant was served at her home. All the stolen property was recovered.

Trials

This month saw the first three weeks of an ongoing first-degree murder trial. There is hope it will end at the end of the month. Although the defense is making much of what they see as a flawed investigation, the evidence is still that everyone was at a bar, the defendant was the person who had the gun that he had brought in, and he was the one who pulled the gun and pointed it at the victim, smoke and mirrors notwithstanding.

ADA Angela Jamieson had a DUI trial in which the defense brought in their hired gun, Dr. Hstalla to besmirch the Datamaster. Thanks to the help of Jeanne Swartz, the jury did not even wait to have their lunch brought in before returning a guilty verdict.

ADA Will Walton tried a fish and wildlife case in Homer. The defendant was accused of constructing in an anadromous stream without a permit. Thanks to the good work of the troopers, there was a video of the defendant driving a bulldozer in Fox Creek. The jury convicted, despite the defendant being allowed to raise a necessity defense as a result of flooding that had recently subsided in the area. This was the third trial for this case. The first ended in a hung jury and the second mistried after the jury was seated and the defendant's brother threatened one of the jurors.

Ketchikan DAO

A Ketchikan jury convicted Shelly Jo Douglas of interfering with and resisting arrest. While talking with the police about another matter, Douglas told them that her 18-year-old daughter was in the house. The police officer knew the daughter had a warrant for her arrest. While initially allowing the police to go into the house to arrest her, Douglas' attitude changed when another daughter tried to stop the police. Douglas yelled at the

police, hit them on their vests, and then kicked one officer while taking the daughter into custody and then arresting her.

A Ketchikan dog case ended in a hung jury. A Ketchikan couple was charged with cruelty to animals. Their dog was run over by a car and both back legs were broken with bones sticking out of the skin. The veterinarian recommended euthanasia, but the couple took the dog home. They waited several weeks while the dog was in pain and then had the dog's legs amputated.

A Metlakatla man was found not guilty of misconduct involving a controlled substance in the fourth degree but guilty of misconduct involving a controlled substance in the sixth degree. He possessed marijuana near a school but testified he did not realize he was within 500 feet of the school even though he lived nearby.

Kodiak DAO

A 41-year-old Kodiak woman was sentenced to five months in jail, and placed on probation for four years, following her conviction for possession of cocaine, a class C felony offense. She was also convicted of violating her conditions of release, a class A misdemeanor, for ingesting drugs while she was on release pending trial. She received an additional 180 days in jail, all suspended, upon the same conditions and length of probation as in her felony case.

A 24-year-old Kodiak man was indicted for attempted sexual assault in the first degree and physical assault in the third degree following his attempt to sexually assault his victim at knife point. Attempted sexual assaults are historically difficult to prove because, almost by definition, there is no physical evidence available (physical injury, DNA evidence, etc.), and the only evidence is very often the uncorroborated testimony of the victim. However, this victim audio-taped her dreams for self-analysis. The last thing she would do before retiring for the evening would be to turn on her digital recorder, sit it beside her bedside, and go to sleep. On this

particular evening she did not deviate from her normal pattern, and when the assailant woke her up by sitting on the middle of her back while attempting to pull down her panties, the digital recorder was running. This quick-witted victim promised to cooperate rather than risk physical injury, and then feigned needing to go to the bathroom. She then locked herself in the bathroom and called the police. When the defendant came knocking, she informed him the police were on the way. Upon hearing this, the assailant decided it was time to leave.

However, the problem with an audio recording is that while you may be able to hear conversation, you may or may not be able to identify the speaker, depending on the quality of the recording, and the amount of background noise. This ill-fated defendant took care of identification. Not wanting to leave the victim's apartment without accomplishing anything, he decided to steal what appeared to be an MP3 player sitting beside the victim's bed. When police contacted the defendant about an hour later, he still had the victim's recorder in his pockets – still running. A subsequent review of the audio recording indeed revealed, among other things, his declarative statement to the victim that if she screamed or didn't cooperate with his efforts, he would "cut her throat".

This defendant remains in custody on \$50,000 cash only bail plus the requirement of a court approved third party custodian. A May 2007 trial date is pending.

Nome DAO

In Noatak, around 2:00 am on February 6, 2007, the village police officer dropped off an intoxicated Jan Westlake in front of Charlie Bailey's place. Bailey, who had also been drinking, immediately confronted Westlake and the two began wrestling. The VPO watched as the wrestling match turned into an all-out fight. This drew Charlie's father, Billy Bailey, from his house across the street. The elder Bailey told the two to stop, but without success. Charlie gained the upper hand over Westlake, pinned his back to

the ground, and yelled for his father to shoot him. Billy Bailey grabbed a semi-auto .22 rifle from his arctic entry, and told the VPO and Westlake to leave or he would kill them both. Billy then fired a warning shot into the ground. The VPO turned and ran, but Westlake, held down by Charlie, could not. Charlie continued to tell his father to shoot Westlake, while he begged for his life. The elder Bailey walked over to Westlake, pointed the muzzle at his forehead and fired. With the shot, the Baileys fled. Westlake however survived. The bullet hit just over his left eye but glanced off his skull leaving a vertical gash running up his forehead. Westlake played dead until the Baileys' had gone. He then got up and ran for help, leaving a puddle of freezing blood in the snow with a .22 casing nearby. Charlie later said little to troopers, and his father claimed no memory of what happened because he had been too drunk. Nevertheless, Billy Bailey accepted full responsibility for the shooting. Both father and son were indicted for attempted murder.

For the first time in years, in December 2006, Clifford Murray returned to his home village of Elim in December 2006. Murray's brother had just died and village members bought him a ticket home for the funeral. Murray's travel was made easier by his recent parole for a 1992 sex assault 1. At around 6:00 am in the morning on December 16, 2006 he was high on homebrew. He peered into the windows of the home of E.L., an elderly grandmother who lived alone. Murray, anticipating what he could find inside, kicked open the door and walked in. The breaking sound woke E.L. She thought it might have been a puppy that had recently run away, so she got out of bed and went to her living room. There she found Murray stripped down to nothing but his white socks. Murray raped E.L. twice. The second time occurred after E.L. had fled the house, and Murray dragged her back inside. When Murray left, E.L., who had known Murray since he was a child, reported the rape. Murray was returned to custody, and this month a grand jury returned indictments for two counts of sexual assault 1. Trial is set for April 2007.

Palmer DAO

Kimberly Dubie was arrested on February 26, 2007 on charges of murder in the second degree, manslaughter and criminally negligent homicide for the death of her eight-week-old baby. The allegations are that, on February 9, 2007 Dubie was so intoxicated she was unable to care for the child, and the child died from positional asphyxia. ADA Rachel Gernat is the prosecutor.

Mario Page was convicted of murder in the second degree and kidnapping for his role in the shooting of Terell Houngues in May of 2005. Mario Page, though not one of the shooters, set the endeavor in motion because Houngues stole nine ounces of cocaine from Page. Page, Kira Gray and Tommie Patterson took Houngues to a remote area near Houston, where Gray and Patterson shot the victim. Gray first shot Houngues in the legs and, after being told by Page to shut him up, shot Houngues in the head. Patterson shot the victim after Gray ran out of bullets. The trial prosecutor was ADA Steve Wallace.

Upon remand from the Court of Appeals, District Court Judge Gregory Heath found, in *State v. Travis Clark*, that medical persons were not acting as agents for the police when gathering information from the domestic violence victim, since the information was for purposes of emergency medical evaluation, diagnosis and treatment. Clark was convicted after jury trial of domestic violence assault in the fourth degree. During the trial, the victim asserted her privilege against self-incrimination, and the state proceeded without her testimony. Statements by the victim identifying the defendant as her assailant were contained in the medical records and entered into evidence by the prosecutor. The Court of Appeals found the defendant had waived any hearsay objections to the statements, but remanded the case for further findings as to the circumstances of the victim's statements to medical personnel, and whether those statements were "testimonial" for purposes of implicating the

right of confrontation. The case now goes back to the Court of Appeals for further briefing in light of Judge Heath's findings. ADA Suzanne Powell is handling the case for the state.

ADA Rachel Gernat prosecuted the following cases:

Richard Horton was sentenced to 15 years, with nine years suspended, for long-term sexual abuse of his stepdaughter. At the sentencing, Horton apologized for his "infidelity," but denied the abuse. He was an active member of the military at the time of the crimes, but the military deferred prosecution to the state. Horton has been incarcerated since April of 2006.

William McKechnie was sentenced to a total of three years, with one suspended, on charges of possession of child pornography and indecent viewing.

Gerardo Castellanos-Arbaca was indicted on charges of sexual abuse of a minor in the second degree.

Jerry Tanner was indicted on charges of sexual assault in the first degree and attempted sexual assault.

Christopher Woodard was indicted on a charge of sexual abuse of a minor in the first degree.

Heath Fithian was indicted on a charge of sexual abuse of a minor in the second degree.

Joe Marquis and John Elder were indicted, in separate cases, on charges of assault in the second degree and assault in the third degree (domestic violence – strangulation).

SAVE THE DATE

May 2-4, 2007 Alaska Bar Association Annual Convention – Fairbanks

June 19-21, 2007 NAAG Summer Meeting – Atlanta, Georgia

July 22-25, 2007 CWAG Annual Meeting – Anaheim, CA